

HIGH COURT OF TRIPURA
AGARTALA
CrI.A.No.06 of 2023

Shri Sarathi Sarkar,
son of late Sadhan Sarkar,
resident of South Bagadi,
P.S. Airport, District : West Tripura

---- Convict-Appellant(s)

Versus

The State of Tripura

----Respondent(s)

For Appellant(s)	:	Mr. J. Bhattacharjee, Adv. Mr. Sajib Ghosh, Adv.
For Respondent(s)	:	Mr. Raju Datta, P.P.
Date of Hearing	:	26.02.2024
Date of Judgment & Order	:	05.03.2024
Whether fit for reporting	:	YES

HON'BLE MR. JUSTICE BISWAJIT PALIT

Judgment & Order

Heard Mr. J. Bhattacharjee, Learned counsel assisted by Mr. Sanjib Ghosh, Learned counsel appearing for the convict-appellant as well as Mr. Raju Datta, Learned P.P. appearing for the State-respondent.

2. This is an appeal preferred under Section 374(2) of Cr.P.C. challenging the judgment and order of conviction and sentences dated 24.04.2023 passed by Learned Special Judge (POCSO), West Tripura, Agartala in connection with Case No.Special (POCSO)22 of 2019 whereby the convict-appellant has been convicted

and sentenced to suffer SI for three years and to pay a fine of Rs.20,000/- for the offences punishable under Section 8 of POCSO Act, ID to payment of fine the convict shall suffer SI for further one month and to pay a fine of Rs.1000/- for the offence punishable under Section 448 of IPC, ID to payment of fine the convict shall suffer SI for five days. It was further ordered that the sentences of imprisonment shall run concurrently.

3. Before proceed with the merit of the appeal let us discuss about the case of the prosecution before the Learned trial Court. The prosecution in this case was set into motion on the basis of an FIR laid by the informant Smti. Ruma Sarkar (Das) alleging inter alia that on 12.01.2019 at about 7:00 pm in the evening the convict-appellant namely Sarathi Sarkar came to the house of the informant when she was not available at her home. During that period, her two daughters and one niece, i.e. the daughter of the brother of the informant who are all minors were present in the house. That time, the appellant-accused gave Rs.10 each to the minor daughters of the informant as well as her niece and asked them to go to their room. After that, the accused told that his 'bara maa', i.e., the victim-daughter of the informant, aged about 13 years shall come with him and thus he called the minor victim girl out of the room and taking her in the dark, the accused-appellant touched her breast, tried to disrobe her wearing pant with intention to commit rape upon her. The victim raised alarm and on hearing her shouting, the brother of the informant namely, Pintu Das and his wife Smti. Sushmita Das came out of their dwelling hut and saw the accused-appellant to flee away when the victim was crying. The said brother of the informant went to her shop and

informed about the incident to her. The informant after some time came to her house where the victim narrated the whole incident to her. Hence, the informant laid the case.

4. On the basis of complaint of the informant, O/c Airport PS registered Airport PS Case No.2019/ARP/003 dated 13.01.2019 under Sections 354 of IPC read with Section 8 of the POCSO Act and the case was endorsed to IO for investigation. The IO conducted investigation and after completion of investigation, he laid charge-sheet against the present accused-appellant vide Airport PS C.S. No.19 of 2019 dated 31.03.2019 under Section 448/354 of IPC and also under Section 8 of the POCSO Act. Before the Learned trial Court formal charge under Section 448/354A of IPC and also under Section 8 of the POCSO Act was framed against the accused-appellant. The appellant denied the charge and pleaded not guilty and claimed to be tried. During trial, to substantiate the charge, prosecution adduced in total ten numbers of witnesses and the prosecution has relied upon some documents which were marked as Exhibits in the case.

“(A) PROSECUTION WITNESSES :-

PW-1-Smt. Ruma Sarkar(Das), mother of the victim (informant),

PW-2-Sri Pintu Das, younger brother of the informant.

PW-3-Miss, Baisakhi Sarkar (younger sister of victim).

PW-4-Sri Kanti Nath Ghosh(RO).

PW-5-Sri Ranjan Nag.

PW-6-Victim (name withheld).

PW-7-Smt. Riya Das, relative of the informant.

PW-8-Smti. Madhabi Das, WSI.

PW-9-Smti. Sushmita Sarkar.

PW-10-Ubaydur Rahaman, IO

(B) PROSECUTION EXHIBITS :-

Exhibit-1/1, signature of informant (PW 1) on the written complaint.

Exhibit-2, seizure list dated 13.01.2019 prepared by PW 10, the IO of the case.

Exhibit-2/1 is the signature of PW 1 on the seizure list with respect of the seizure of birth certificate of the victim and 3 numbers of 10 rupees notes.

Exhibit-2/2, signature of PW 2 on the seizure list with respect to the seizure of birth certificate of the victim and 3 numbers 10 rupees notes.

Exhibit-2/3, signature of PW 10 on the seizure list dated 13.01.2019.

Exhibit-3, seized birth certificate of the victim.

Exhibit-4, signature of PW 3 on her statement recorded by the Magistrate.

Exhibit-5/1, receipt and registering note of PW 4(RO) on the written complaint.

Exhibits-6 and 6/1 respectively are the printed form of FIR and the signature of PW 4 over the same.

Exhibit-7, signature of PW 6(victim) on her statement recorded by the Magistrate u/s. 164(5-A) of the Cr.P.C.

Exhibit-8, signature of PW 7 on her statement recorded by the Magistrate u/s.164(5-A)(a) of the Cr.P.C.

Exhibit-9, the hand-sketch map of the PO prepared by PW 10.

Exhibit-9/1, signature of PW 10 on the hand-sketch map.

Exhibit-10, index of the hand-sketch map prepared by PW 10.

Exhibit-10/1, signature of PW 10 on the aforesaid index of hand-sketch map.

Exhibit-MO.1 series are the seized 3 numbers 10 rupees currency notes proved by PW 1.

(C) DEFENCE WITNESSES:- NIL.

(D) DEFENCE EXHIBITS:- NIL.

(E) CITATIONS:-

BY PROSECUTION:-

1) Md. Israil Vs State of West Bengal, date of decision 02.02.2022.

BY DEFENCE :- NIL."

5. The defence theory was that of total denial and as such the accused-appellant also took the plea that on that relevant point of time he was working at the barrack and came back after four days and also pleaded as innocent simplicitor and denied to adduce any witnesses in support of his defence. Finally, on conclusion of trial and after hearing arguments of both the sides Learned Court below found the appellant to be guilty of offences and convicted him accordingly for which this present appeal is preferred.

6. At the time of hearing of argument, Mr. J. Bhattacharjee, Learned counsel appearing for the appellant submitted that in this case, the prosecution case suffers from various infirmities but the

Learned Court below did not consider those infirmities and ultimately, gave an erroneous finding for which the present appellant deserves to be acquitted from the charges of conviction returned by the Learned trial Court. In support of his contention, Learned counsel for the appellant submitted that in this case, the FIR was not proved as required by law, the signature of the informant was also not proved and exhibited, even the scribe, who according to the prosecution had written the FIR was not produced by the prosecution before the Learned Court for which there is no scope to place any reliance upon the said alleged FIR but the Learned Court below did not consider this point at the time of delivery of judgment.

7. Learned counsel for the appellant further submitted that the charge framed by the Learned Court below was also defective because according to the prosecution, the alleged incident took place on 12.01.2019 at about 7 p.m. in the evening but the charge was framed mentioning that on 12.01.2019 at about 17:00 hrs.. There was no explanation in this regard from the side of the prosecution for which the conviction cannot sustain against the appellant on the basis of defective charge framed.

8. Learned counsel for the appellant further submitted that no independent witnesses were adduced by the prosecution in this case to support the case of the informant because PW-5 in course of his cross-examination specifically mentioned the name of so many persons who are the adjacent dwellers of the informant but none of the witnesses were adduced by the prosecution for which the prosecution case has also become doubtful because had there be any such incident took place, definitely the adjacent neighbourers would

have some information but the prosecution knowing fully the fact that those independent witnesses i.e. the neighbourers would not support the prosecution story withheld their examination in the case.

9. Learned counsel for the appellant also submitted that there was also delay in lodging the FIR. According to him, the alleged incident took place on 12.01.2019 in the evening and the Airport P.S. was very nearby to the residence of the informant. On that day, no FIR was laid. According to the prosecution, although the FIR was submitted at P.S. on 13.01.2019 in the morning at about 8 a.m. but the case was registered on 13.01.2019 at about 20:30 hrs. No explanation is given in this regard by the prosecution. So, there is an ample scope to disbelieve the belated FIR.

10. Learned counsel for the appellant also submitted that in this case, the age of the victim was not proved. According to him, all though the informant stated that the age of her victim daughter was 13 years and the victim herself stated that she was 15 years of age on the day of alleged occurrence. But according to Learned counsel, the victim was not less than 22 years of age on the day of alleged occurrence and since the victim was aged about 22 years, so no charge could frame against the appellant under Section 8 of the POCSO Act but the Learned Court below did not consider the said fact and framed charge against the appellant under Section 8 of the POCSO Act. Furthermore, none of the witnesses of this prosecution could say anything about the date of birth of the victim. All though, the prosecution relied upon the birth certificate issued by the authority but the author issuing the certificate was not produced by the prosecution to substantiate the actual age of the victim on the day

of alleged occurrence. So, there was no scope to place any reliance upon the so called birth certificate but the Learned Court below also did not consider the said point at the time of delivery of judgment. He has also referred the evidence of PW-5 and submitted that due to previous enmity, the appellant has been falsely implicated but said PW-5 was not declared hostile by the prosecution.

11. Learned counsel for the appellant submitted that if the evidence of the prosecution is meticulously examined, in that case, it would come out that the witnesses of the prosecution made first time statement before the Court and on the basis of first time statement, there was no scope to believe the prosecution story and to convict the appellant in a case of this nature. So, Learned counsel for the appellant finally submitted that since, the evidence of prosecution suffers from various infirmities so the intervention of the Court is required and the appellant-accused deserves to be acquitted from the charges leveled against him and urged for setting aside the judgment of the Learned Court below.

12. Per contra, Mr. Raju Datta, Learned P.P. representing the prosecution has submitted that any Court before deciding any case is to scrutinize the evidence on record very carefully and the Court is to see the quality not the quantity of the evidence. Learned P.P. further submitted that if the evidence of the victim is carefully analyzed, in that case, it would be clear that the appellant by the trend of cross-examination could not raise any doubt to disbelieve her evidence and from her cross-examination it also appears that the appellant-accused did not try to make her evidence unshaken to disbelieve her testimony and there is no cross-examination regarding the alleged

prosecution story from the evidence of the victim. Thus, the evidence of the victim remains un-impeached. So, on the sole evidence of the victim, there is every scope to award conviction against the present appellant in view of the provision of Section 134 of the Indian Evidence Act and the Learned Court below after considering the evidence on record rightly and reasonably found the appellant to be guilty and convicted him accordingly.

13. Learned P.P. further submitted that since the evidence of the victim was trustworthy and there was no cross-examination to the evidence of said victim regarding the alleged prosecution story, so, on the basis of her statement, there is every scope to convict him. Furthermore, since the evidence of the victim was unshaken by the accused-appellant, so for non-production of the Magistrate who recorded the statement of the victim under Section 164 Sub-clause 5 of Cr.P.C. it cannot be said that the prosecution case has become doubtful. He also submitted that all though the contents of the FIR was not proved but for non-production of this scribe there was no scope to disbelieve the prosecution story.

14. Finally, Learned P.P. submitted that the Learned trial Court after careful analysis of the evidence on record found the appellant to be guilty and convicted him accordingly and there is no scope to interfere with the judgment of the Learned trial Court and urged before the Court to uphold the conviction and sentence passed by Learned trial Court by dismissing the present appeal.

Considered.

15. Both the parties at the time of their argument referred some citations which would be discussed later on. Prior to that, I think

that it would be prudent to discuss herein below the relevant part of the evidence of the prosecution to substantiate the charge. It is to be noted here that the Learned trial Court at the time of delivery of judgment determined the following points for decision of the case.

"POINTS FOR DETERMINATION

- (1) Whether on the alleged date and time of occurrence, the victim girl was a 'child' within the meaning of the POCSO Act?**
- (2) Whether on the alleged date, time and place the accused person namely, Sarathi Sarkar committed house trespass by entering into the house of the victim girl (name withheld) with intent to commit the offence of sexual assault ?**
- (3) Whether on the alleged date, time and place the accused person namely, Sarathi Sarkar sexually harassed the victim girl (name withheld)?**
- (4) Whether on the alleged date, time and place the accused person namely, Sarathi Sarkar sexually assaulted the victim girl (name withheld)?"**

As already stated to substantiate the charge, prosecution has adduced ten numbers of witnesses.

16. PW-1, Smti. Ruma Sarkar (Das) is the informant of this case. She deposed that she laid FIR against the present appellant and identified him. According to her, on 12.01.2019 at about 7:00 p.m. she went to local market (Narayanpur) for purchasing vegetables. When her daughters namely, the victim and Baisakhi Sarkar along with niece Riya Das were alone in the house and her younger brother Pintu Das and his wife were in a separate dwelling hut. That time, the appellant Sarathi Sarkar entered into her dwelling room and provided Rs.10/- each of the minor daughters. After that, the accused took her elder daughter i.e. the victim outside the dwelling room and forcibly embraced her by pressing her chest. The accused also tried to disrobe her daughter forcibly by removing her wearing pant. Her daughter thereafter raised alarm and on hearing her alarm, her brother Pintu came out of his dwelling room and the accused ran away. Her brother chased the accused but could not detain him. On the way back to her

house from the market, she found her brother when he told her that the accused committed the above misdeed and on returning back to her home, she found her daughter Priya was crying and on her asking, she narrated the entire incident to her. She informed the matter to her relatives on that night. On the following day in the morning, she went to Airport PS and lodged the written complaint which was prepared by one Dhruba as per her dictation. She did put her signature on the written complaint and identified the same marked Exbt.1/1. She also stated that on the day of lodging complaint, i.e. on 13.01.2019 police visited her house and seized the original copy of birth certificate of her daughter and also three numbers of 10 rupees notes which were given by the appellant to her daughters and niece. She also put her signature on the seizure list and identified her signature marked Exbt.2/1. She also identified the Birth Certificate which was marked Exbt.3,. three numbers of Indian Currency Notes of Rs.10/- marked as Exbt.MO.1 series.

During cross-examination she could not say the relevant date and number of the birth certificate of her daughter and also could not say the design and the number of the currency notes. She also could not say the case number in connection of which the seizure was made. She has also stated the scribe of the complaint was one Advocate's Clerk and further stated that there were educated families in their locality and those families were situated to a audible distance. She has also stated that she went to Airport PS around 8/8.30 a.m. She further stated that it was not mentioned in the written complaint that she went to purchase vegetables. She further stated that she did not mention in her written complaint that she went to Narayanpur

market. But again the appellant made suggestion that she did not go to Narayanpur market for purchasing vegetables. She further stated that in her written complaint it was not mentioned that her brother chased the accused and that her brother was running and she found her brother on the way back to home when her brother narrated her the incident being asked. But again she was put under suggestions denying the entire fact. She further stated that in her written complaint she did not mention that the currency notes were given to her by her daughters and niece. She further stated that she stated to IO that the electricity light which was set up outside her dwelling room was not in order. But again she was put under suggestion by the appellant denying the said fact. She further stated that she lodged the ejahar in the morning at about 8.30 a.m. on the following day of the alleged incident. Police visited her house on that day in the evening and remained in her house for about half an hour and the wearing apparels of her daughter were not seized by police.

17. PW-2, Sri Pintu Das is the brother of the informant. He deposed that on 12.01.2019 at about 7 p.m. he was in his dwelling hut and hearing about a cry of his victim niece he rushed out and found her crying on the courtyard and also have seen the accused running out of their courtyard. He asked the matter when the victim told him that the accused Sarathi Sarkar grabbed her with indecent intention. He followed the accused but could not catch him. That time his niece also stated that the accused provided her three 10 rupee notes for purchasing chips by which he tried to allure her. His mother and the informant were out of the house at that relevant point of time and when they returned home they have narrated the incident. They

informed the matter to the local people and on the next day, her sister lodged complaint at police station. During investigation, the police seized all the 10 rupee notes, as well as the birth certificate and the witness put his signature on the seizure list marked Exbt.2/2 and identified the currency notes and the birth certificate marked Exbt.3 and Exbt.MO-1 series.

During cross-examination he stated that he himself and his sister, the informant resides in the same house. Houses of Lalit Sarkar is situated to the adjacent East where after, Ranjan Nag, Suman Bardhan also resides in the same line. Houses of Bhulan Sarkar, Bikash Nag, Ajit Nag and Madan Sarkar are situated their Southern side. Houses of Asish Sarkar, Debu Sarkar, Ratan Biswas, Bindu Gupta and Jiban Nag are situated at their Northern side. He has further stated that the neighbouring people came to know about the alleged incident later on and came to visit their house. He has also stated that there exists 3 dwelling huts in their house consisting of total 6 rooms. He further stated that he did not say to police that he came out of his room at the alleged point of time hearing cry of his niece. He did not say to IO that the accused provided three 10 rupee notes to the victim to purchase chips. He has further stated that he did not say to police that he informed the matter to the local people. He again stated that it was about 8 pm when his mother and informant returned back home. He also stated that he identified the accused with the help of light in their courtyard but he did not say the same to the police. Airport PS is at a distance of about 2 km from his house.

18. PW-3, Miss. Baisakhi Sarkar is one of the child witness. Before recording her evidence, her veracity was tested by the Learned trial Court below. She deposed that the informant is her mother. On 12.01.2019 at about 7 pm she along with her elder sister the victim and Riya were studying inside the room and her mother and grandmother were out to the market. That time both of her maternal uncles were present in their respective rooms. That time, her 'Kaku' who is the brother-in-law of her 'pishi' called all of them on the courtyard and as they went out he gave each Rs.10/- to have snacks. They came back to the room when 'kaku' again called his elder sister out and as she went to the courtyard again, she heard her crying loudly. She along with others, her maternal uncles and aunts came to the courtyard and found her sister crying. When she stated that the accused grabbed her forcefully and also pressed upon her breasts and out of pain she cried loudly. Her maternal uncle chased the accused who fled away immediately after the incident but, could not catch him. Later, she was produced before the Court where her statement was recorded. She identified her signature on the statement recorded by Magistrate marked Exbt.4 and she identified the accused-appellant through mobile phone display.

During cross-examination she stated that she did not say to IO as to how she could see the accused at the relevant time or that she would be able to identify him by face. Also stated that there exists several other houses round them. Further stated that their neighbouring people did not come to the house hearing about hue and cry of her sister. She did not state to police that 'kaku' called them on the courtyard and gave the money. She did not say to police that her

elder sister told her that the accused grabbed her forcefully and also pressed her breasts. She rushed to the market immediately after the incident and informed the matter to her mother where after she along with her grandmother rushed back to home at about 7.20 p.m. Nothing more came out relevant.

19. PW-4, Sri Kanti Nath Ghosh deposed that on 13.01.2019 he was posted at Airport PS as O/c. On that day, he received one ejahar from the informant namely Smti. Ruma Sarkar and accordingly he registered Airport P.S. Case No.2019/ARP/03 dated 13.01.2019 under Section 354 of IPC and Section 8 of the POCSO Act. He identified his endorsement on the margin of FIR marked Exbt.5/1, identified the printed FIR form marked Exbt.6 and the signature marked Exbt.6/1. He further stated that he endorsed the charge to SI Ubaydur Rahaman of Airport P.S..

During cross-examination, he stated that he did not mention in the FIR regarding the delay of one day in lodging the FIR.

20. PW-5, Ranjan Nag deposed that on 13.01.2019 in the evening one Smt. Ruma Das came to his house and stated that on 12.01.2019 in the evening at about 7 p.m., the accused person namely Sarathi Sarkar entered into the housing complex of the victim and molested her and identified the accused the court in the dock.

During cross-examination, he deposed that on Dulal Sarkar is the husband of the informant namely Smt. Ruma Sarkar(Das). Smt. Minati Sarkar is the eldest sister of Dulal Sarkar and Lalmohan Sarkar is the husband of Smt. Minati Sarkar. Lalmohan Sarkar is the elder brother of the accused. There is a dispute between the informant and her husband and the accused is trying to mitigate

the aforesaid dispute but the said informant of the instant case is not willing to mitigate the said dispute. He further stated that he opened his shop at about 8 a.m. in the morning and the same is closes at about 9 p.m. Again stated that the informant deals in the business of country made liquor. He is the Secretary of the market and he heard from the people around that on 12.01.2019, in the evening a dispute cropped up between the informant and the accused.

21. PW-6, the victim has deposed that one day in the year 2019 at about 7:00 p.m. in the evening, the accused Sarathi Sarkar residing in their locality came to their dwelling house when they were reading in the room. Said accused called them and when they came out the accused provided them Rs.10/- each for some refreshment. Subsequently, they returned back to their room but at that time, the accused again called her outside and thereupon, he forcefully embraced her and touched different parts of her body. She raised hue and cry and when her maternal uncle and other family members rushed to the spot on seeing them, the accused fled away. She further stated that during investigation, police produced her before Magistrate, when her statement was recorded and she put her signature on the statement and on identification the same was marked Exbt.7 and identified the accused.

During cross-examination she stated that the accused is her uncle i.e. the brother-in-law of her paternal aunt. Name of the paternal aunt is Smti. Minati Sarkar and the name of her husband is Sri Lalmohan Sarkar. Accused is the brother of Lalmohan Sarkar. Minati Sarkar is the sister of her father Dulal Sarkar. She further stated that her mother and her father are living separately since last

10 years. She stated to IO that after receiving Rs.10/- each for refreshment and subsequently, they went back to their room. But the witness admitted that she made such statement to the IO and that portion was marked as Exbt.D/1 subject to confirm by IO.

22. PW-7, Smti. Riya Das is another minor girl. She deposed that the informant is her paternal aunt. On 12.01.2019 at about 7.00 p.m. in the evening, the accused Sarathi Sarkar residing in their locality came to the dwelling house of the informant. That time she along with his two sisters including the victim were reading in the room and when the accused called them and they came out of the room and thereupon, he offered Rs.10/- each for some refreshment. Subsequently, they went back to their room but at that time, the accused again called her sister who accordingly went outside whereupon, he heard the hue and cry of his victim sister and rushed to the spot along with other family members. On query, her sister i.e. the victim disclosed that accused Sarathi Sarkar forcibly embraced her and touched different parts of her body. During investigation, one day police produced her before the Magistrate, where her statement was recorded by the Magistrate and she identified her signature on the statement recorded by Magistrate marked Exbt.8.

During cross-examination, she stated that she was not examined by the police.

23. PW-8, Smti. Madhabi Das S.I. of Police deposed that on 14.01.2019 she was posted as SI of police at Airport P.S and on that day, she recorded the statement of the victim and two other minor witnesses under Section 161 of Cr.P.C.

During cross-examination she stated that she was requested by the IO to record the statement of the victim and other two minor girls verbally.

24. PW-9, Smti. Sushmita Sarkar deposed that on 12.01.2019 the incident took place during evening hours when she was present in her residence. That time he heard a cry of the victim girl coming from the courtyard of their house. She rushed to the courtyard and asked the victim girl what was happened. She also stated that she found her in undressed condition and on being asked, the victim girl stated her that the accused Sarathi Sarkar has touched her private parts and made her such condition.

During cross-examination, she was confronted with the statement that she stated to police that she had seen the victim girl in undressed condition and on being drawn attention the said statement was not found to be recorded in her statement under Section 161 of Cr.P.C. She also confronted with the statement that she stated to police that then she rushed to the courtyard and asked the victim girl what was happened and on being asked, the victim girl stated her that the accused touched her private parts. Attention of the witness being drawn to her statement recorded under Section 161 of Cr.P.C. to which she admitted the absence of such statement over there. She further stated that she stated to IO that since the electric bulb of the courtyard was out of order since many days for that it was dark. But again she volunteered that there was street light in the road which is adjacent to their house. She further stated that there was a marital dispute between Ruma Sarkar (Das) and Dulal Sarkar and both of them are residing separately. She again stated that her dwelling room

is situated on the Northern side of her house and the dwelling room of Ruma Sarkar (Das) is situated on the Western side of the same house. She stated that there are three girl children in their house and they study in the said Western viti room of their house. She again stated that Ruma Sarkar (Das) has a vegetable selling business in Narayanpur Bazar and sometime her husband Pintu Das also used to sit in the said vegetable selling shop of Ruma Sarkar (Das).

25. PW-10, Sri Ubaydur Rahaman is the IO of this case. He has deposed that the case was endorsed to him for investigation. During investigation he examined the informant and the other witnesses and recorded their statements under Section 161 of Cr.P.C. He seized three numbers of 10 rupee note (Exbt.MO-1) and the original birth certificate of the victim by a seizure list dated 13.01.2019. The witness identified the seizure list dated 13.01.2019 which was marked as Exbt.2 and the signature of the witness on the same has been marked as Exbt.2/3. He confirmed Exbt.M.O.1 series and confirmed Exbt.3. He visited PO on 14.01.2019 and prepared hand sketch map with separate index. He identified the hand sketch map with separate index along with the signature over the same marked as Exbt.9, Exbt.9/1, Exbt.10 and Exbt.10/1. He also examined the available witnesses including the victim on the same date and also recorded their statements under Section 161 of Cr.P.C. and also arranged for recording the statement of the victim girl under Section 164(5) of Cr.P.C. before the Learned Magistrate. After completion of investigation, he laid charge-sheet against the appellant-accused.

During cross-examination, he deposed that as per the FIR the alleged incident took place on 12.01.2019 and the FIR at the

Airport P.S. was received on 13.01.2019 at about 19:00 hrs. Also stated that the FIR was prepared on 13.01.2019. He has further stated that he has not cited the persons of location 'C' and location 'D' of the hand sketch map as a witness in this case. He has also stated that he has not mentioned the numbers mentioned on the currency notes in the seizure list dated 13.01.2019. He has further stated that since 12.01.2019 till 13.01.2019 victim and the child witnesses were in the custody of their parents only.

26. These are the synopsis of the material evidence on record of the prosecution in respect of determination of the aforesaid points. I have heard detailed arguments of both the sides and gone through the record of the Learned Court below very carefully. Admittedly, in this case, the writer of the FIR was not produced so the contents of the FIR could not be proved. Also, in this case, the prosecution could not adduce the Learned Magistrate who recorded the statements of the victim and two other witnesses. Now, here in this appeal, we are to see as to whether the judgment of the Learned trial Court deserves interference or not.

27. In course of hearing of arguments, Learned counsels of the parties referred some citations in support of their respective contention. Let us discuss the citation for the sake of brevity of the case. Learned counsel for the appellant in course of hearing of argument relied upon the judgment of our High Court in **Sri Sanju Tanti versus The State of Tripura [Judgment dated 07.04.2022 in Crl.A.No.19 of 2020]**. In para-9 of the said judgment, the Hon'ble High Court has observed as under:

"9. After careful perusal of the record it is found that the offence under Section 8 of the POCSO Act has not been established beyond reasonable doubt. The prosecution

witnesses including the victim has not specifically stated anything that there was any intention of the accused to molest her. However, though she stated that the accused had touched her hand, in this situation, in my opinion, the ingredients of Section 8 have not been fulfilled and conviction and sentence under Section 8 of the POCSO Act stand quashed and set aside. However, it has been proved that the accused had trespassed the house of the complainant."

Referring the same, Learned counsel for the appellant submitted that in the case at hand, the prosecution has failed to prove the charge beyond reasonable doubt against the appellant under Section 8 of the POCSO Act. So, Learned counsel urged for taking note of the aforesaid judgment in deciding the present case.

28. Learned counsel for the appellant has referred another judgment of our High Court in **Sri Nakul Sharma versus The State of Tripura [judgment dated 02.08.2016 in CrI.A.(J)No.29 of 2016]**. In para-16 of the said judgment, the Hon'ble High Court has observed as under :

16. In this case, no doubt there is prima facie material of act with sexual intent which involved physical contact without penetration. Thus if the victim's age is proved to be below 18 years, the conviction of the appellant under Section 8 may not have been questioned on that premises. But this court has observed that the prosecution could not prove the age of the victim following the procedure as laid down by the apex court in Alamelu and Another vs. State Represented by Inspector of Police, where it has been held that :

38. We may now take up the issue of Sekar's conviction under Section 376 IPC. Whilst upholding the conviction of Sekar under Section 376 IPC, the High Court has held that the girl would not have voluntarily gone with Sekar. It has also been held that she was not a major at the relevant time. In our opinion, both the conclusions recorded by the High Court are contrary to the evidence on record.

39. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ext. P-16 and the certificate issued by PW 8 Dr. Gunasekaran, Radiologist, Ext. P-4 and Ext. P-5.

40. Undoubtedly, the transfer certificate, Ext. P-16 indicates that the girl's date of birth was 15-6-1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e. 31-7-1993. The transfer certificate has

been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Evidence Act, 1872. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined.

41. We may notice here that PW 1 was examined in the Court on 9-8-1999. In his evidence, he made no reference to the transfer certificate (Ext. P-16). He did not mention her age or date of birth. PW 2 was also examined on 9th August, 1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311 CrPC seeking permission to produce the transfer certificate and to recall PW 2. This petition was allowed. She was actually recalled and her examination was continued on 26-4-2000. The transfer certificate was marked as Ext. P-16 at that stage, i.e. 26-4-2000. The judgment was delivered on 28-4-2000. In her crossexamination, she had merely stated that she had signed on the transfer certificate, Ext. P-16 issued by the school and accordingly her date of birth noticed as 15-6-1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate.

42. Considering the manner in which the facts recorded in a document may be proved, this Court in *Birad Mal Singhvi Vs. Anand Purohit* : 1988 Supp SCC 604, observed as follows: (SCC pp. 618-19, para 14)

"14. The date of birth mentioned in the scholars' register has no evidentiary value unless the person who made the entry or who gave the date of birth is examined. Merely because the documents Exts. 8, 9, 10, 11, and 12 were proved, it does not mean that the contents of documents were also proved. Mere proof of the documents Exts. 8, 9, 10, 11 and 12 would not tantamount to proof of all the contents or the correctness of date of birth stated in the documents. Since the truth of the fact, namely, the date of birth of Hukmi Chand and Suraj Prakash Joshi was in issue, mere proof of the documents as produced by the aforesaid two witnesses does not furnish evidence of the truth of the facts or contents of the documents. The truth or otherwise of the facts in issue, namely, the date of birth of the

two candidates as mentioned in the documents could be proved by admissible evidence i.e. by the evidence of those persons who could vouchsafe for the truth of the facts in issue. No evidence of any such kind was produced by the respondent to prove the truth of the facts, namely, the date of birth of Hukmi Chand and of Suraj Prakash Joshi. In the circumstances the dates of birth as mentioned in the aforesaid documents have no probative value and the dates of birth as mentioned therein could not be accepted.

43. The same proposition of law is reiterated by this Court in **Narbada Devi Gupta Vs. Birendra Kumar Jaiswal : (2003) 8 SCC 745** where this Court observed as follows: (SCC p.751, para 16)

"16. The legal position is not in dispute that mere production and marking of a document as exhibit by the court cannot be held to be a due proof of its contents. Its execution has to be proved by admissible evidence, that is, by the 'evidence of those persons who can vouchsafe for the truth of the facts in issue'.

44. In our opinion, the aforesaid burden of proof has not been discharged by the prosecution. The father says nothing about the transfer certificate in his evidence. The Headmaster has not been examined at all. Therefore, the entry in the transfer certificate cannot be relied upon to definitely fix the age of the girl.

[Emphasis supplied]"

Referring the same, Learned counsel for the appellant submitted that in this case before the Learned Court below the prosecution could not prove the age certificate of the victim being minor as required under Section 2(d) of the POCSO Act to substantiate the charge under Section 8 of the POCSO Act and submitted that since the prosecution has failed to prove the age of the victim on the day of alleged occurrence, so, the judgment passed by the Learned trial Court below cannot sustain.

29. Learned counsel for the appellant further referred another citation of Hon'ble Apex Court in **Alamelu and Another versus State Represented By Inspector of Police in Case No.Criminal**

Appeal 1053 of 2009 dated 18.01.2011 where the said Hon'ble Apex Court in para-38 observed as under :

"38. We will first take up the issue with regard to the age of the girl. The High Court has based its conclusion on the transfer certificate, Ex.P16 and the certificate issued by PW8 Dr. Gunasekaran, Radiologist, Ex.P4 and Ex.P5. Undoubtedly, the transfer certificate, Ex.P16 indicates that the girl's date of birth was 15th June, 1977. Therefore, even according to the aforesaid certificate, she would be above 16 years of age (16 years 1 month and 16 days) on the date of the alleged incident, i.e., 31st July, 1993. The transfer certificate has been issued by a Government School and has been duly signed by the Headmaster. Therefore, it would be admissible in evidence under Section 35 of the Indian Evidence Act. However, the admissibility of such a document would be of not much evidentiary value to prove the age of the girl in the absence of the material on the basis of which the age was recorded. The date of birth mentioned in the transfer certificate would have no evidentiary value unless the person, who made the entry or who gave the date of birth is examined. We may notice here that PW1 was examined in the Court on 9th August, 1999. In his evidence, he made no reference to the transfer certificate (Ex.P16). He did not mention her age or date of birth. PW2 was also examined on 9th August, 1999. She had also made no reference either to her age or to the transfer certificate. It appears from the record that a petition was filed by the complainant under Section 311 Cr.P.C. seeking permission to produce the transfer certificate and to recall PW2. This petition was allowed. She was actually recalled and her examination was continued on 26th April, 2000. The transfer certificate was marked as Ex.P16 at that stage, i.e., 26th April, 2000. The judgment was delivered on 28th April, 2000. In her cross-examination, she had merely stated that she had signed on the transfer certificate, Ex.P16 issued by the School and accordingly her date of birth noticed as 15th June, 1977. She also stated that the certificate has been signed by the father as well as the Headmaster. But the Headmaster has not been examined. Therefore, in our opinion, there was no reliable evidence to vouchsafe for the truth of the facts stated in the transfer certificate."

Referring the same, Learned counsel has further submitted that since the age of the victim girl has not been proved by the prosecution by adducing cogent and documentary evidence on record, so, the judgment passed against the appellant is liable to be set aside.

30. Learned P.P. representing the prosecution at the time of hearing of argument has relied upon few citations and submitted that

the principles of citations as relied upon by the prosecution are very much identical for decision of this present case and urged for taking note of the principles in delivering the judgment of this case. In **Tushar Singha versus State of Tripura [judgment dated 04.05.2021 in Crl.A.(J)No.02 of 2020]** our Hon'ble High Court in para-28 of the said judgment has observed as under :

"28. This court finds it more reassuring when this court juxtaposed the age vis-à-vis the class in which the victim was reading. So far the assault is concerned, it is clearly covered by the definition of aggravated sexual assault. Let us examine further whether the alleged offence comes under the definition of sexual assault. For being in the fold of sexual assault under Section 9(m), the requirement is not the aggravated sexual assault, but sexual assault as defined under Section 7 of the POCSO Act. It is the said provisions which Mr. Saha, learned counsel has sought to take recourse for lesser sentence. Sexual assault as defined under Section 7 of the POCSO Act is that whoever, with sexual intent touches the vagina, penis, anus or breast of the child that immediately makes the sexual assault. In the present case, the case of the victim was very categorical. The appellant has pressed her breast. For that reason, the ingredients of sexual assault is complete and hence this court does not find any infirmity in the finding of conviction. However, for the same reason, the offence punishable under Section 354(A)(1)(i)(iv) of the IPC stands proved inasmuch as Section 354A is the charging provisions for sexual harassment or punishment for sexual harassment. It has been provided therein that a man committing physical contact and advances involving unwelcome and explicit sexual overtures; or sexually coloured remarks will be guilty of sexual harassment. In the present case, there is no definite evidence in respect of unwelcome and explicit sexual overtures or making sexually coloured remarks but there is evidence of the physical contact which falls under Section 354(A)(1)(i) of the IPC. Thus, the special judge has rightly returned the conviction under Section 354(A)(1)(i)(iv) of the IPC. But considering the Section 42 of the POCSO Act, since Section 10 qua Section 9(m) provides the higher sentence, the special judge has sentenced the appellant under Section 10 of the POCSO Act."

Referring the same, Learned counsel submitted that in the case at hand, Learned Court below has rightly convicted the appellant under Section 8 of the POCSO Act and as such, there is no scope to interfere with the judgment of the Learned trial Court.

31. Learned P.P. further referred another judgment of the Apex Court of India in **Soundarajan versus State Rep. by the Inspector of Police Vigilance Anticorruption Dindigul in Criminal Appeal No.1592 of 2022 dated 17.04.2023** where the said Hon'ble Apex Court in para-15 of the said judgment observed as under :

"15. Under Section 464 of Cr.P.C, omission to frame a charge or any error in charge is never fatal unless, in the opinion of the Court, a failure of justice has in fact been occasioned thereby. In this case, from the perusal of the crossexamination of PW3 and other prosecution witnesses made by the Advocate for the appellant, it is apparent that the appellant had clearly understood the prosecution case about the first alleged demand made on 6th August 2004 and the subsequent alleged demand and acceptance on 13 th August 2004. There is no doubt that this is a case of omission to frame a proper charge, and whatever charge has been framed is, per se defective. However, by reason of the said omission or defect, the accused was not prejudiced insofar as his right to defend is concerned. Therefore, in this case, the omission to frame charge and/or error in framing charge is not fatal."

Referring the same, Learned P.P. submitted that as submitted by Learned counsel for the appellant that the time as mentioned in the charge was defective but that error in the charge cannot be treated as fatal because due to said error, there is no evidence on record that the present appellant has been prejudiced. So, according to Learned P.P., improper mentioning of time in the charge does not create any doubt about the prosecution story.

32. Learned P.P. referred another judgment of our Hon'ble High Court in **Sri Nil Krishna Roy versus The State of Tripura [judgment dated 31.08.2021 in Crl.A.(J)No.40 of 2019]** where the said High Court in para-14 has observed as under :

"[14] On the aspect of determination of age of the victim, a decision of the apex court in State of Madhya Pradesh vs. Pritam, reported in AIR 2018 SC 4218 has been pressed. In that report, the apex court has observed that in each and every case, the prosecution cannot be expected to examine

the person who had admitted the student in the school. The school registers are the authenticated documents being maintained in the official course, to attach with credence of much weight, of course unless is proved otherwise. Thus, the school certificate cannot be brushed aside. Mr. Datta, learned PP has submitted that in the case in hand, so far the victim is concerned, not only her school certificate issued by the Headmaster [in-charge] of Amtali High School [Exbt.16] has been admitted without any objection from the defence, but also the ossification report has clearly demonstrated the age of the victim. They are supporting each other. Mr. Datta, learned PP has also emphatically stated that every case has to be decided on its own facts. In the present case, the prosecution has established the charge against the appellant without any shred of doubt. Moreover, the foundational facts have been placed to raise the imminent presumption under Section 29 of the POCSO Act against the appellant. The statement of the victim girl has remained unimpeached and it has been corroborated by the evidence of the other inmates as referred before in respect of immediate reporting by the victim. Mr. Datta, learned PP has submitted that there had been no delay in lodging the FIR when the complainant came to know about the heinous incident from the victim and other inmates. The complainant [PW-2] has stated in the trial that the girls told him about the incident. At that time, the victim was present there and he had immediately taken action as per law. He has also stated that he was instructed by the Child Line to lodge the complaint. It is quite understandable why there had been delay in filing the complaint. Finally, Mr. Datta, learned PP has referred to a decision of the apex court in State of Punjab vs. Gurmit Singh and others, reported in (1996) 2 SCC 384, where it has been clearly laid down that the testimony of the victim of sexual assault is vital and unless there are compelling reasons which necessitates looking for corroboration of her statement, the court should find no difficulty in acting on the testimony of the victim of sexual assault alone, to convict an accused where her testimony inspires confidence and is found to be reliable. In this context, Mr. Datta, learned PP has contended that the victim has narrated the occurrence graphically to PW-17 at the time of her medical examination. The said statement made to PW-17 is coherent with her statement in the trial. Even the defence has failed to find any contradiction in this regard. Mr. Datta, learned PP has submitted that the appellant does not deserve any leniency for the nature of crime he has committed and as such, no inference is required either in the finding of conviction or in the order of sentence."

Learned P.P. further referred another citation of Hon'ble Supreme Court of India in **Harpal Singh and Another versus State of Himachal Pradesh** reported in **(1981) 1 SCC 560** where in para-3 of the said judgment the Hon'ble Apex Court has observed as under:

"3. In the instant case the prosecution has proved the age of the girl by over whelming evidence. To begin with, there is the evidence of Dr. Jagdish Rai (PW 14) who is a radiologist and who, after X-Ray examination of the girl found that she was about 15 years of age. There is corroborated by Ex. PF which is an entry in the admission register maintained at the Government girls High School, Samnoli (where in the girl was a student) and which is proved by the Head Master. That entry states the date of birth of the girl as 13th October, 1957. There is yet another document, viz,, Ex. PD, a certified copy of the relevant entry in the birth register which shows that Saroj Kumari, who according to her evidence was known as Ramesh during her childhood, was born to Lajwanti wife of Daulat Ram on 11-11-1957. Mr. Hardy submitted that in the absence of the examination of the officer/chowkidar concerned who recorded the entry, it was inadmissible in evidence. We cannot agree with him for the simple reason that the entry was made by the concerned official in the discharge of his official duties that it is therefore clearly admissible under Section 35 of the Evidence Act and that it is not necessary for the prosecution to examine its author. From whatever angle we view the evidence, the conclusion is inescapable that Saroj Kumari was below 16 years of age at the time of the occurrence. Accordingly we agree with judgments of the courts below and see no merit in this appeal which is dismissed."

Learned P.P. has also referred another citation of Hon'ble Supreme Court of India in **Cidco versus Vasudha Gorakhnath Mandevlekar** reported in **(2009) 7 SCC 283** where the said Apex Court in para-18 of the said judgment observed as under :

"20. The Deaths and Births register maintained by the statutory authorities raises a presumption of correctness. Such entries made in the statutory registers are admissible in evidence in terms of Section 35 of the Indian Evidence Act. It would prevail over an entry made in the school register, particularly, in absence of any proof that same was recorded at the instance of the guardian of the respondent. [See *Birad Mal Singhvi v. Anand Purohit* : AIR 1988 SC 1796]."

Referring the aforesaid three citations, Learned P.P. submitted that the statutory authority responsible for issuing the birth certificate has issued the certificate. So, a presumption of its correctness can be taken into consideration and such entries in the statutory registers are admissible in evidence under Section 35 of the Evidence Act. Here, in the case at hand, the prosecution has proved

the certificate issued by the authority [Exbt.3] without any objection from the appellant-accused. So, for non-production of the issuing authority it cannot be said that the same was not admissible as per law and proved.

33. Learned P.P. has also referred another citation of Hon'ble Supreme Court of India in **Appabhai and Another versus State of Gujarat** reported in **1988 (Supp) SCC 241**. In para-11 of the said judgment, the Hon'ble Apex Court has observed as under :

"11. In the light of these principles, we may now consider the first contention urged by the learned Counsel for the appellants. The contention relates to the failure of the prosecution to examine independent witnesses. The High Court has examined this contention but did not find any infirmity in the investigation. It is no doubt true that the prosecution has not been able to produce any independent witness to the incident that took place at the bus stand. There must have been several of such witnesses. But the prosecution case cannot be thrown out or doubted on that ground alone. Experience reminds us that civilized people are generally insensitive when a crime is committed even in their presence. They withdraw both from the victim and the vigilante. They keep themselves away from the Court unless it is inevitable. They think that crime like civil dispute is between two individuals or parties and they should not involve themselves. This kind of apathy of the general public is indeed unfortunate, but it is there everywhere whether in village life, towns or cities. One cannot ignore this handicap with which the investigating agency has to discharge its duties. The court, therefore, instead of doubting the prosecution case for want of independent witness must consider the broad spectrum of the prosecution version and then search for the nugget of truth with due regard to probability if any, suggested by the accused. The Court, however, must bear in mind that witnesses to a serious crime may not react in a normal manner. Nor do they react uniformly. The horror stricken witnesses at a dastardly crime or an act of egregious nature may react differently. Their course of conduct may not be of ordinary type in the normal circumstances. The Court, therefore, cannot reject their evidence merely because they have behaved or reacted in an unusual manner. In *Rana Pratap and Ors. v. State of Haryana* : (1983) 3 SCC 327. speaking for this Court succinctly set out what might be the behaviour of different persons witnessing the same incident. The learned Judge observed :

Every person who witnesses a murder reacts in his own way. Some are stunned, become speechless and stand rooted to the spot. Some become hysteric and start wailing. Some start shouting for help. Others run away to keep themselves as far removed from the spot as possible. Yet others rush to the rescue of the

victim, even going to the extent of counter-attacking the assailants. Every one reacts in his own special way. There is no set rule of natural reaction. To discard the evidence of a witness on the ground that he did not react in any particular manner is to appreciate evidence in a wholly unrealistic and unimaginative way."

Referring the same, Learned P.P. submitted that for minor omission there is no scope to disbelieve the entire prosecution case.

34. Learned P.P. further referred another citation of Hon'ble Supreme Court of India in **Dharam Deo Yadav versus State of Uttar Pradesh** reported in **(2014) 5 SCC 509**. In para-37 of the said judgment, the Hon'ble Apex Court has observed as under :

"37. The accused, in his examination under Section 313 Cr.P.C., had denied the prosecution case completely, but the prosecution has succeeded in proving the guilt beyond reasonable doubt. Often, false answers given by the accused in the 313 Cr.P.C. statement may offer an additional link in the chain of circumstances to complete the chain. See Anthony D'souza v. State of Karnataka: (2003) 1 SCC 259. We are, therefore, of the considered view that both the trial Court as well as the High Court have correctly appreciated the oral and documentary evidence in this case and correctly recorded the conviction and we are now on sentence."

He also referred another judgment of Hon'ble Supreme Court of India in **Rajkumar versus State of Madhya Pradesh** reported in **(2014) 5 SCC 353**. In paras-21, 22 & 23 of the said judgment, the Hon'ble Apex Court has observed as under :

"21. Admittedly, the appellant did not take any defence while making his statement under Section 313 Cr.P.C., rather boldly alleged that the family of the deceased had roped him falsely at the instance of the police. However, appellant could not reveal as for what reasons the police was by any means inimical to him.

22. The accused has a duty to furnish an explanation in his statement under Section 313 Cr.P.C. regarding any incriminating material that has been produced against him. If the accused has been given the freedom to remain silent during the investigation as well as before the court, then the accused may choose to maintain silence or even remain in complete denial when his statement under Section

313 Cr.P.C. is being recorded. However, in such an event, the court would be entitled to draw an inference, including such adverse inference against the accused as may be permissible in accordance with law. (Vide: Ramnaresh & Ors. v. State of Chhattisgarh: AIR 2012 SC 1357; Munish Mubar v. State of Haryana: AIR 2013 SC 912; and Raj Kumar Singh alias Raju @ Batya v. State of Rajasthan : AIR 2013 SC 3150).

23. In the instant case, as the appellant did not take any defence or furnish any explanation as to any of the incriminating material placed by the trial court, the courts below have rightly drawn an adverse inference against him. The appellant has not denied his presence in the house on that night. When the children were left in the custody of the appellant, he was bound to explain as under what circumstances Gounjhi died."

Referring the said principles, Learned P.P. drawn the attention of the Court that the appellant did not take any proper defence at the time of examination under Section 313 of Cr.P.C. Rather, he took a plea that he was out of home for four days but in this regard, no documentary evidence was adduced and proved to substantiate his defence before the Learned Court. So, according to Learned P.P., Learned trial Court rightly disbelieved the said statement of appellant at the time of delivery of judgment.

35. Learned P.P. has referred another citation of the Hon'ble Supreme Court of India in **Phool Singh versus State of Madhya Pradesh** reported in **(2022) 2 SCC 74** where the said Apex Court in paras-11 & 15 of the said judgment has observed as under :

"11. Applying the law laid down by this Court in the aforesaid decisions to the facts of the case on hand and as observed hereinabove, we see no reason to doubt the credibility and/or trustworthiness of the prosecutrix. She is found to be reliable and trustworthy. Therefore, without any further corroboration, the conviction of the accused relying upon the sole testimony of the prosecutrix can be sustained.

15. Now so far as the submission on behalf of the accused that there was a delay of three days in lodging the FIR is concerned, at the outset, it is required to be noted that it was the specific and consistent case on behalf of the prosecutrix that

immediately on the occurrence of the incident, she narrated the incident to her sister-in-law (Jethani) and mother-in-law but they did not believe the prosecutrix. On the contrary, they beat her. Even no other family members in her matrimonial home supported the prosecutrix and therefore she sent message to her parental house and thereafter she was taken to her parental house and FIR was lodged. It is very unfortunate that in this case the sister-in-law and mother-in-law though being women did not support the prosecutrix. On the contrary, she was compelled to go to her parental house and thereafter the FIR was lodged. Being women at least the sister-in-law and mother-in-law ought to have supported the prosecutrix, rather than beating her and not believing the prosecutrix. Therefore, when in such a situation, the delay has taken place in lodging the FIR, the benefit of such delay cannot be given to the accused who as such was the relative."

Referring the same, Learned P.P. submitted that delay in this case was not fatal because the alleged accident took place on 12.01.2019 in the evening and immediately thereafter, the informant reported the matter to the local Murabbis or her relatives and on the following day in the morning she laid the FIR. So, there was no reasonable delay in lodging the FIR for which as submitted by Learned counsel for the appellant there is no scope to disbelieve the evidence of the prosecution.

36. Learned P.P. has referred another judgment of Hon'ble Supreme Court of India in **State of Madhya Pradesh versus Preetam** reported in **(2018) 17 SCC 658** where the Apex Court in paras-10 & 11 has observed as under :

"10. In our considered view, the answer elucidated in the cross-examination of Dr. Vasnik (PW-6) cannot be taken as a final opinion on the age of the prosecutrix (PW-1). It is to be relevant to note that before the trial court the prosecution has examined Bhaulal (PW-8), Head master/Head teacher of Primary School Chor Pind Ke Par, District Balaghat. In his evidence, Bhaulal (PW-8) has stated that the date of birth of the prosecutrix (PW-1) was 16th May, 1981 which means that on the date of the occurrence i.e. 6th March, 1993, the prosecutrix (PW-1) was only aged about 12 years. The trial court has neither acted upon the evidence of Bhaulal (PW-8) nor on the

school certificate on the ground that the person who has admitted the prosecutrix in the school was not examined.

11. In our considered view, the approach of the trial court was not correct. In each and every case the prosecution cannot be expected to examine the person who has admitted a student in the school. The school registers are the authentic documents being maintained in the official course, entitled to credence of much weight unless proved otherwise. In our view, considering the evidence of head master, Bhaulal (PW-8), and the school certificate produced by him i.e. Ex.P/13-A, age of the victim has to be taken as 12 years at the time of occurrence."

Referring the same, Learned P.P. submitted that since the author of Exbt.3 was not produced and Exbt.3 was marked without any objection from the other side. So, at this stage, it cannot be said that no reliance could be placed upon Exbt.3 and Learned trial Court has committed error in this regard.

37. Learned P.P. has referred another citation of Hon'ble Supreme Court of India in **Harivadan Babubhai Patel versus State of Gujarat** reported in **(2013) 7 SCC 45** where the said Apex Court in paras-24 & 25 has observed as under :

"24. In **State of H.P. v. Gian Chand** : (2001) 6 SCC 71, it has been opined that :

"14. non- examination of a material witness is not a mathematical formula for discarding the weight of the testimony available on record, howsoever natural, trustworthy and convincing it may be. The charge of withholding a material witness from the court leveled against the prosecution should be examined in the background of the facts and circumstances of each case so as to find whether the witnesses are available for being examined in the court and were yet withheld by the prosecution."

The three-Judge Bench further proceeded to observe that the court is required first to assess the trustworthiness of the evidence available on record and if the court finds the evidence adduced worthy of being relied on, then the testimony has to be accepted and acted upon though there may be other witnesses available who could also have been examined but were not examined.

25. In Takhaji Hiraji v. Thakore Kubersing Chamansing and others : (2001) 6 SCC 145, the Court has opined thus: -

"19. It is true that if a material witness, who would unfold the genesis of the incident or an essential part of the prosecution case, not convincingly brought to fore otherwise, or where there is a gap or infirmity in the prosecution case which could have been supplied or made good by examining a witness who though available is not examined, the prosecution case can be termed as suffering from a deficiency and withholding of such a material witness would oblige the court to draw an adverse inference against the prosecution by holding that if the witness would have been examined it would not have supported the prosecution case. On the other hand if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non- examination of such other witnesses may not be material. In such a case the court ought to scrutinise the worth of the evidence adduced. The court of facts must ask itself – whether in the facts and circumstances of the case, it was necessary to examine such other witness, and if so, whether such witness was available to be examined and yet was being withheld from the court. If the answer be positive then only a question of drawing an adverse inference may arise. If the witnesses already examined are reliable and the testimony coming from their mouth is unimpeachable the court can safely act upon it, uninfluenced by the factum of non-examination of other witnesses."

Referring the same, Learned P.P. submitted that omission or contradiction would not be fatal by the prosecution case. Here, according to Learned P.P. in the given case all though some minor contradictions were there, but for those minor contradictions or omissions, there is no scope to disbelieve the prosecution story.

38. Finally, Learned P.P. submitted that since the prosecution has been able to prove the charges leveled against the appellant and Learned trial Court below after considering the materials on record rightly found the appellant to be guilty and convicted him accordingly.

39. In the case at hand, after hearing Learned counsels of both the sides and also after going through the judgment of the Learned Court below and on perusal of the principles of the citations it appears to me that admittedly, in this case, the writer of the FIR/ejahaar was not produced by the prosecution but the informant in course of her examination tried to substantiate her version in the FIR, she identified her signature on the ejahaar. The appellant by the trend of cross-examination could not raise any doubt to disbelieve the FIR and furthermore, the evidence of PW-1 could not be unshaken by the accused-appellant in this case. So, for not proving the contents of the FIR, it cannot be said that the prosecution case has become doubtful.

40. Regarding delay in lodging the FIR it was submitted by the prosecution that the alleged incident took place on 12.01.2019 and the victim attended Airport P.S. on 13.01.2019 in the morning at about 8/8.30 a.m. and on that day, the case was registered. It is also evidence on record that soon after the incident the victim reported the matter to their near relatives. In a case of this nature, it is quite natural that after the alleged occurrence the victim party would definitely consult with their other relatives or guardian and here in the case at hand, the informant also did the same job and on the following day of the occurrence she laid the FIR. So, there was no fault from the side of the informant to lodge the case against the appellant and the case was registered on 13.01.2019 at about 20/36 hrs. It is also on record that on the same day in the evening the police came to the residence of the informant. More so, it was not possible on the part of the informant to know at what time the case was registered by the Officer-in-Charge of the concerned police station on

the basis of the FIR of the informant but considering the facts and circumstances of this case in view of the principles of law laid down by the Hon'ble Supreme Court of India it can safely be come to the conclusion that there was no such delay in lodging the FIR of the present case.

41. Now, in respect of proving of the document [Exbt.3] it is the admitted position that the prosecution could not produce the author of the issuing authority of the birth certificate but it appears that the same was marked as Exhibit during trial without any objection from the other side. More so, it was a public document which was issued after observing the official formalities and as such, it is admissible under Section 35 of the Indian Evidence Act. Furthermore, the informant being the mother of the victim girl in course of her examination stated that on the alleged day of occurrence, the age of the victim was 13 years and the victim herself stated in course of her examination that her age was 15 years. Moreover, the mother is the right person to say the age of her daughter. Exact date may not be given. So, there is no scope to disbelieve the evidence of PW-1 regarding the age of the victim as 'child' within the definition of Section 2(d) of the POCSO Act on the day of alleged occurrence of offence. The appellant took the plea that the victim was around 22 years of age but in this regard, to counter the submission of the prosecution, the appellant could not place any place rebuttable evidence on record save and except denial. Before the Learned Court charge was framed under Section 354(a) of IPC and also under Section 8 of the POCSO Act but the Learned Court below after considering the evidence on record and considering the

gravity of the nature of offence convicted the appellant under Section 8 of the POCSO Act.

42. More interestingly, the victim in course of her examination specifically narrated everything about the alleged occurrence of offence. But if we go through the cross-examination part of the victim by the accused-appellant it appears that her total evidence has been remained unshaken and un-impeached by the accused-appellant. So, after careful analysis of the evidence on record of the victim girl I do not find any scope to disbelieve her evidence in the given case and for non-production of Magistrate who recorded the statement of the victim girl along with other witnesses all though the victim identified her signature on the statement recorded by the Magistrate without any objection from the other side it appears that the evidence of the victim was free from any sort of embellishment to sustain the charge leveled against the appellant. Furthermore, the other two minor witnesses i.e. PW-3 and PW-7 who were in the house at that relevant point of time it appears that those two minor witnesses very categorically in course of their examination tried to support the version of the victim i.e. PW-5, the appellant by way of cross-examination could not in any manner made any cloud to disbelieve their evidences nor could unshaken their evidence.

43. In course of hearing of argument, Learned counsel for the appellant drawn the attention of the Court that the prosecution save and except the members of the same family could not adduce any neighbouring persons to support the prosecution story but here in the case at hand from the evidence on record, it appears that on the alleged day soon after the occurrence, nobody appeared except the

family members. All though, some of the witnesses might have heard the fact later on but the prosecution could not adduce any neighbouring persons. For non-production of any neighbouring persons, there is no scope to disbelieve the evidence on record of the victim since other two minor witnesses PW-3 and PW-7 very categorically supported the version of the victim girl. More so, PW-2 who is the brother of the informant namely Pintu Das also in course of his examination very specifically stated that on the alleged day just after hearing hue and cry of the victim when he came out of the dwelling room that time he found the appellant to flee away from the courtyard. So, the appellant also by the trend of cross-examination could not raise any circumstance or suspicion to disbelieve the evidence of the said witness PW-2. Similarly, PW-3 and PW-7 also supported the version of PW-2 in this regard. The appellant in course of his cross-examination under Section 313 of Cr.P.C. took the plea that he was not at home on the alleged day and time and he returned back after four days. But this plea of alibi of the appellant could not be proved by the appellant by any cogent, supportive or reliable evidence. So, no reliance can be placed upon the said plea of the accused-appellant.

44. Furthermore, on perusal of the provision of Section 29 and Section 30 of the POCSO Act it appears that in the given case the presumption would go against the appellant and the accused-appellant by way of cross-examination of the prosecution witnesses could not rebut the presumption under Section 29 and Section 30 of the POCSO Act. Furthermore, as submitted by Learned counsel for the appellant, all though, the evidence of PW-5 did not support the

prosecution story in full but this witness was hearsay witness and this witness was also not present to the PO at the time of alleged occurrence of offence, rather, he heard the said fact of incident from the informant. Thus, from the evidence of said witness, it appears that the evidence of the said witness neither supported the prosecution story nor also supported the defence version.

45. It was further submitted by Learned counsel for the appellant that the wearing apparels of the victim was not seized but here in the case at hand considering the gravity and considering the nature of allegation it appears that it is not a case where in absence of seizure of wearing apparels there was no scope to prove the case of the prosecution. Furthermore, as referred by PW-9 in her examination-in-chief that she was in undressed condition it appears that the term 'undressed' used by the Learned trial Court cannot be taken that the appellant disrobed her, rather it may so happen that when the witness found the victim that time she might have noticed the victim in some discursive situation for which in course of examinations he deposed before the Court that she found the victim in undressed condition.

46. Learned counsel for the appellant also pointed out that at the time of alleged occurrence there was dark night as according to the prosecution witness the electric bulb was out of order. But there is also evidence on record that there was street light in the road which was adjacent to the residence of the informant. So, it cannot be said that the victim could not identify the appellant on that relevant point of time and PW-3 also being the maternal uncle of the victim did not found the appellant at the time of fleeing away from the alleged PO.

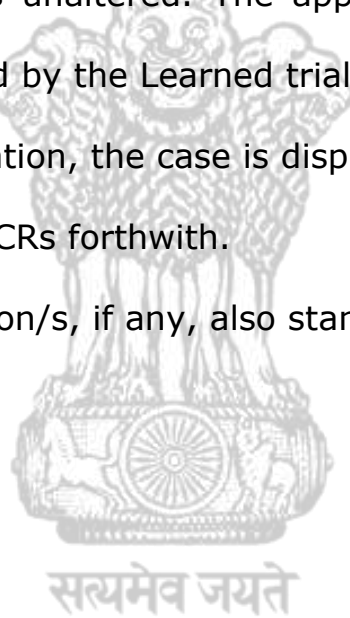
47. Thus, after careful analyzing of the evidence on record and also having scrutinizing the evidence of the victim which remain un-impeached this Court does not find any embargo to disbelieve the evidence of the victim girl (PW-5) as a whole and to rely her testimony for affirming the finding of conviction and sentence. As such, this Court does not find any scope to interfere with the judgment passed by the Learned trial Court below.

48. In the result, this Court is bound to hold that there is no scope/ground to reverse the finding of the Learned trial Court and accordingly, the appeal filed by the appellant stands dismissed and the sentences passed stands unaltered. The appellant shall have to serve the sentence as ordered by the Learned trial Court.

With this observation, the case is disposed of on contest.

Send down the LCRs forthwith.

Pending application/s, if any, also stands disposed of.



JUDGE